

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MARTIN G. HINRICHS)	
Claimant)	
VS.)	
)	Docket No. 159,865
MARTIN G. HINRICHS)	
Respondent)	
AND)	
)	
WAUSAU UNDERWRITERS INSURANCE COMPANY)	
Insurance Carrier)	
AND)	
)	
KANSAS WORKERS COMPENSATION FUND)	

ORDER

All parties requested review of the Award entered by Administrative Law Judge John D. Clark dated March 18, 1996. The Appeals Board heard oral argument on August 14, 1996, in Wichita, Kansas.

APPEARANCES

Claimant appeared by his attorney, Diane F. Barger of Emporia, Kansas. The respondent and its insurance carrier appeared by their attorney, Douglas C. Hobbs of Wichita, Kansas. The Workers Compensation Fund appeared by its attorney, Becky C. Hurtig of Wichita, Kansas.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award.

ISSUES

The Administrative Law Judge awarded claimant permanent partial disability benefits for a 70 percent work disability. The issues now before the Appeals Board for review are:

- (1) Whether claimant injured or aggravated his right knee or back in a work-related accident on or about October 4, 1991.
- (2) Claimant's average weekly wage.
- (3) Nature and extent of disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds:

For the reasons indicated below, the Award entered by the Administrative Law Judge should be modified.

(1) The Appeals Board adopts the Administrative Law Judge's conclusion that claimant injured both his back and right knee on or about October 4, 1991, when he slipped from a ladder while climbing down from his truck. The accident arose out of and in the course of claimant's employment. Shortly after that incident, claimant sought medical treatment from orthopedic surgeon Charles D. Pence, M.D., who had earlier treated claimant for both back and right knee problems. After a period of conservative treatment and epidural steroid injections, in November 1991 Dr. Pence performed a decompressive laminectomy at both the L4-5 and L5-S1 intervertebral levels. Because of the problems claimant was continuing to experience with his right knee, in December 1991 the doctor performed a total knee replacement. In April 1993, Dr. Pence fused the lumbar spine at L3-4 and L4-5 levels due to chronic instability and worsening back pain.

The respondent and Workers Compensation Fund argue that claimant failed to prove that the right knee was injured or aggravated in the October 1991 accident. The Appeals Board disagrees. The record indicates that claimant had right knee surgery in January 1980 and that his symptoms had resolved. Before the October 1991 accident, claimant had not sought additional medical treatment for his knee since his release following the 1980 surgery. In addition, Dr. Pence testified that claimant aggravated an arthritic condition in his right knee in the October 1991 accident. Although it is true that claimant would eventually have had to undergo a total knee replacement regardless of the October 1991 accident, it appears it is more probably true than not true that the accident intensified claimant's symptoms and accelerated the need for that surgery.

(2) This case demonstrates the difficulties in determining average weekly wage for self-employed individuals. Generally, a self-employed person's average weekly wage for workers compensation purposes is derived by adding cash withdrawals to those items and

expenses paid to or on behalf of an individual which constitute economic gain. However, the parties did not present a detailed breakdown of those disbursements. Therefore, the Appeals Board must determine average weekly wage by other methods being mindful of the directions set forth in Thompson v. Harold Thompson Trucking, 12 Kan. App. 2d 449, 748 P.2d 430 (1987).

At regular hearing claimant introduced a document entitled Statement of Weekly Earnings which purports to list claimant's wages for the 26-week period preceding the date of accident. The document was offered into evidence without objection. Although the document indicates claimant was paid a total of \$24,820.72 for the 26-week period shown, the correct mathematical total of the figures represented in that document is \$29,820.72, or \$1,146.95 per week. An examination of claimant's 1991 income tax return indicates that claimant's business enterprise could have generated an average weekly wage of that shown on the earning statement when one considers the following: first, the depreciation expense of \$9,628 shown in the return is a "non-cash" expense; second, the meals and entertainment expense shown in the return could be included in the amounts shown in the Statement of Weekly Earnings document; and third, that a portion of the earnings shown in the earnings document may have been paid from profits generated in prior years. As the form Schedule C from the tax return indicates, claimant's business enterprise generated \$25,946 in cash which would have been available to disburse to claimant as cash withdrawals. That number is derived by subtracting the \$32,492 in out-of-pocket expenses from the \$58,438 in gross receipts. Depreciation expense is not subtracted because it is merely a "paper" or accounting expense and does not affect the amount of available cash. Therefore, the Schedule C gives some credence to claimant's earnings document.

Despite claimant's testimony that he intended to keep his annual business income under \$8,000 to avoid a reduction in his social security retirement benefit, the Appeals Board finds the best gauge of claimant's average weekly wage based upon this record is the earnings statement provided by claimant. Therefore, the Appeals Board finds claimant's average weekly wage is \$1,146.95.

(3) The Appeals Board finds that claimant has a 60 percent work disability for which he is entitled to receive permanent partial disability benefits as provided by K.S.A. 1991 Supp. 44-510e. The Appeals Board adopts the Administrative Law Judge's conclusion that claimant has a 28 percent whole body functional impairment as indicated by Dr. Pence, claimant's long-standing treating orthopedic surgeon. The Appeals Board also adopts the Administrative Law Judge's conclusion that claimant has lost 35 to 40 percent of his ability to perform work in the open labor market based upon vocational rehabilitation expert Jim Molski's analysis of Dr. Pence's restrictions. Although claimant cannot return to work as an over-the-road truck driver, claimant retains the ability to perform those jobs in the open labor market which do not violate Dr. Pence's restrictions which were as follows: no lifting greater than 40 pounds; avoid bending from the floor level more than two or three times per hour; and avoid bending, twisting, crawling, and deep knee bends. The Appeals Board

also finds Mr. Molski's opinion persuasive regarding claimant's present ability to earn wages. Adopting that opinion, the Appeals Board finds that claimant retains the ability to earn \$5 per hour, or \$200 per week, which results in an 83 percent loss in the ability to earn a comparable wage. Although K.S.A. 1991 Supp. 44-510e does not require the Appeals Board to give equal weight to the loss of ability to perform work in the open labor market and loss of ability to earn a comparable wage, the Appeals Board finds no reason to do otherwise. Therefore, an average of those losses yields a permanent partial general disability of 60 percent.

Although claimant sustained an injury in 1988 for which he received a lump sum settlement in a workers compensation claim, any disability arising from that injury did not contribute to the permanent partial general disability claimant sustained as a result of the October 1991 accident because of the method Mr. Molski employed to determine claimant's losses. As indicated by his report, Mr. Molski considered claimant's pre-injury 40-pound lifting restriction to decrease claimant's pre-injury labor market. Therefore, Mr. Molski determined only that loss which claimant sustained as a result of the October 1991 accident. Because the 1988 injury did not contribute to claimant's ultimate disability, there should be no reduction in the amount of permanent partial disability benefits under K.S.A. 44-510a.

Based upon the above, claimant is entitled to an award of permanent partial general disability benefits for a 60 percent work disability based upon an average weekly wage of \$1,146.95 without reduction or credit.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge John D. Clark on March 18, 1996, should be and the same is hereby, modified.

AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Martin G. Hinrichs, and against the respondent, Martin G. Hinrichs, and his insurance carrier, Wausau Underwriters Insurance Company, for an accidental injury sustained on October 4, 1991, and based upon an average weekly wage of \$1,146.95 for 73.14 weeks of temporary total disability compensation at the rate of \$289.00 per week, or \$21,137.46, followed by 272.88 weeks of permanent partial general disability benefits at the rate of \$289.00 per week in the amount of \$78,862.54, making a total award of \$100,000.00 for a 60 percent work disability.

As of September 6, 1996, there is due and owing claimant 73.14 weeks of temporary total disability compensation at the rate of \$289.00 per week or \$21,137.46, followed by 183.86 weeks of permanent partial disability compensation at the rate of

\$289.00 per week in the sum of \$53,135.54 for a total of \$74,273.00 which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$25,727.00 is to be paid for 89.02 weeks at the rate of \$289.00 per week, until fully paid or further order of the Director.

Pursuant to the stipulations of the parties, the Workers Compensation Fund is responsible for 80 percent of the costs and benefits associated with this award.

IT IS SO ORDERED.

Dated this ____ day of September, 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Diane F. Barger, Emporia, KS
Douglas C. Hobbs, Wichita, KS
Becky C. Hurtig, Wichita, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director